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# IN
# THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1991

CAROL ANKENBRANDT,
AS NEXT FRIEND AND MOTHER OF L.R. AND S.R.,
PLAINTIFF, APPELLANT, PETITIONER

VS.

JON A. RICHARDS AND DEBRA KESLER,
DEFENDANTS, APPELLEES, RESPONDENTS

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

## JOINT BRIEF OF JON A. RICHARDS AND DEBRA KESLER

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## QUESTIONS PRESENTED FOR REVIEW

1) IS THERE A DOMESTIC RELATIONS EXCEPTION TO FEDERAL COURT JURISDICTION?

2) IF SO, DOES IT PERMIT A DISTRICT COURT TO ABSTAIN FROM EXERCISING DIVERSITY JURISDICTION OVER A TORT ACTION FOR DAMAGES?

3) DID THE DISTRICT COURT IN THIS CASE ERR IN ABSTAINING FROM EXERCISING JURISDICTION UNDER THE DOCTRINE OF YOUNGER V. HARRIS, 401 U.S. 37 (1971)?

## PARTIES TO THESE PROCEEDINGS

PLAINTIFFS:

CAROL ANKENBRANDT, PETITIONER ON BEHALF OF HER MINOR DAUGHTERS, STEPHANIE RICHARDS AND LORELEI RICHARDS.

RESPONDENTS:

JON A. RICHARDS
AND
DEBRA KESLER

THERE ARE NO OTHER PARTIES TO THIS PROCEEDING, YET.



## TABLE OF CONTENTS


| | PAGE |
|---|---|
| DECISIONS BELOW ..... | 1 |
| GROUNDS FOR JURISDICTION..... | 1 |
| RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS..... | 2 |
| STATEMENT OF THE CASE ..... | 3-5 |
| SUMMARY OF ARGUMENT ..... | 5 |
| ARGUMENT .....6 to 44 | |
| 1) IS THERE A DOMESTIC RELATIONS EXCEPTION TO FEDERAL DIVERSITY JURISDICTION..... | 6-16 |
| 2) IF SO, DOES IT PERMIT A DISTRICT COURT TO ABSTAIN FROM EXERCISING DIVERSITY JURISDICTION OVER A TORT ACTION FOR DAMAGES..... | 16-21 |
| 3) DID THE DISTRICT COURT ERR IN ABSTAINING FROM EXERCISING JURISDICTION UNDER THE DOCTRINE OF YOUNGER V. HARRIS, 401 U.S. 37, 91 S.CT. 746 (1971)?.....22-44 | |
| CONCLUSION..... | 45 |

TABLE OF AUTHORITIES

PAGE

Ankenbrandt v. Richards,
No. 89-4244 (E.D.La. 12/10/91)..... 1,4

Ankenbrandt v. Richards,
934 F.2d 1262 (5th Cir. 1991)..... 1,4

Barber v. Barber,
62 U.S. 582,
16 L.Ed. 226 (1858)..... 8,16,39

Beal v. Missouri Pac. R. Co.,
312 U.S. 45, 61 S.Ct. 418..... 26

Brillhart v. Excess Ins. Co.
of America,
316 U.S. 491, 62S.Ct.1173..... 32,44

Cohens v. Virginia, 19 U.S. 264
(1821)..... 27

Colorado Riv. Water Consv. Dist. v. U.S.,
424 U.S. 800,
96 S.Ct. 1236 (1976)..... 28,33,34

De La Rama v. De La Rama,
201 U.S. 303, 26 S.Ct. 485 (1906).. 13

District of Columbia Court of
Appeals v. Feldman,
460 U.S. 462, 103 s.Ct. 1303 (1983)... 44

Dombrowski v. Pfister, 380 U.S. 479,
85 S.Ct. 1116 (1965)..... 27

Ex Parte Young, 209 U.S. 123,
28 S.Ct. 441 (1908)..... 24



TABLE OF AUTHORITIES (CON'T)

Ex Parte Burrus, 136 U.S. 586,
10 S.Ct. 850 (1890)..... 9,12,16

Fair Assessment in Real
Estate Ass'n v. McNary,
454 U.S. 100, 102 S.Ct. 177
(1981)..... 28,29

Fenner v. Boykin, 271 U.S. 240,
46 S.Ct. 492 (1926)..... 26

Hewlette v. George, 68 Miss. 703,
9 So. 885 (1891)..... 15,17

Huffman v. Pursue, 420 U.S. 592,
95 S.Ct. 1200 (1975)..... 23

Hurst v. Capitell,
539 So.2d 264 (Sup.Ct. Ala. 1989)..... 20

Judice v. Vail, 430 U.S. 336,
97 S.Ct. 1211 (1977)..... 24,29

Louisiana Power & Light Co.
v. Thibidoux, 360 U.S. 25,
79 S.Ct. 1070 (1959)..... 32

Middlesex County Ethics
Comm. v. Garden State Bar Assoc.,
457 U.S. 423,
102 S.Ct. 2515 (1982)..... 29,31,34

Moses H. Cohen Mem. Hosp.
v. Mercury Const. Corp,
460 U.S. 1,
103 S.Ct. 927 (1983)..... 34

New Orleans Pub. Ser.
v. Council of New Orleans,
109 S.Ct. 2506 (1989)..... 36

TABLES OF AUTHORITIES (CON'T)

Pennzoil Co. v. Texaco, 481 U.S. 1, 107 S.Ct. 1519 (1989)..... 29, 33

Moore v. Sims, 442 U.S. 415, 9 9 S.Ct. 2371 (1979)..... 28

Plauemine Tropical Fruit Co. v. Henderson, 170 U.S. 511, 18 S.Ct. 685..... 7

Popovici v. Agler, 280 U.S. 379, 50 S.Ct. 154 (1930)..... 7,13,16

Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149 (1923)..... 44

Simms v. Simms, 175 U.S. 162, 20 S.Ct. 58 (1899)..... 12

Spielman Motor Sales co. v. Dodge, 295 U.S. 89, 55 S.Ct. 678..... 26

Thompson v. Thompson, 108 S.Ct. 513 (1988)..... 39

Thompson v. Thompson, 218 U.S. 611, 31 S.Ct. 111 (1910)..... 14,17

Toucey v. New York Life, 314 U.S. 118, 135 S.Ct. 139 (1941)..... 24

Trainor v. Hernandez, 431 U.S. 434, 97 S.Ct. 1911 (1977)..... 24

Will v. Calvert Fire Ins. Co., 437 U.S. 655, 98 S.Ct. 2552 (1978)..... 33

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971).... 1,3,5,21,25,31,44



TABLES OF AUTHORITIES (CON'T)

STATUTES AND CONSTITUTIONAL PROVISONS

Constitution of the United States, 10th Amendment, thereof..... 2

Constitution of the United States, Article III, Section 2, thereof ..... 2,6

28 U.S.C. Section 1332..... 2

LSA-R.S. 9:571 (Louisiana)..... 18

LSA-R.S. 9:291 (Louisiana)..... 18

LSA-R.S. 9:4 (Louisiana)..... 35

LSA-R.S. 46:1901 (Louisiana)..... 35

LSA-Civil Code Article 3469 (Louisiana)..... 18

LSA-Children Code, Articles 100-1657 (Louisiana)..... 35

Crime Control Act of 1990, P.L. 101-647, House Report No. 101-681(1), pg. 166..... 40&41

Children's Justice and Assistance Act of 1986, P.L. 99-123..... 41

Legislature History, Child Abuse Prevention Challenge Grants Reauthorization Act of 1989, P.L. 101-126 and Child Abuse Prevention and Treatment Act, House Report No. 101-113..... 42

## DECISIONS BELOW

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ANKENBRANDT V. RICHARDS, NO. 89-4244 (E.D.LA. DECEMBER 10, 1990). UNPUBLISHED.

UNITED STATES COURT OF APPEAL FOR
THE FIFTH CIRCUIT

ANKENBRANDT V. RICHARDS, NO. 91-3037 (5TH CIR. MAY 31, 1991). AFFIRMED, WITHOUT OPINION. 934 F.2d 1262(5TH CIR. 1991).

## GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. Sec. 1254 (1), Sec. 2101(c). A timely petition for Writ of Certiorari was filed on August 29,1991, being within 90 days of the opinion of the 5th Circuit. This Court granted Certiorari on January 10, 1992.

RELEVANT CONSTITUTIONAL

AND

STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES, 10TH AMENDMENT THEREOF:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the Sttes respectively, or to the people.

CONSTITUTION OF THE UNITED STATES, ARTICLE III, SECTION 2, THEREOF:

> The judicial power shall extend to ... controversises between Citizens of different States ....

28 U.S.C. SECTION 1332:

> Diversity of Citizenship; Amount in Controversy; Costs:
> a) The district courts shall have original judicition of all civil actions where the matter in controversy exceeds the sum of value of $50,000, exclusive of interest and costs, and is between -
> 1) citizens of different states.
> ...



STATEMENT OF THE CASE

THIS action was filed on September 26, 1989, with Jurisdiction premised upon diversity of citizenship. Defendant, Kesler, answered on November 6, 1989, denying, specifically, each and every allegation of the complaint. Defendant, Richards, answered on February 13, 1990, denying, specifically, each and every allegation of the complaint. Kesler and Richards challenged the subject matter jurisdiction in their answers. An amended complaint was filed on May 25, 1990, amending dates. On October 29, the 1990, the defendants, Richards and Kesler, jointly filed a Motion To Dismiss, grounded upon The Domestic Relations Exception to Federal Jurisdiction and the Abstention Doctrine of Comity and Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971).

Plaintiffs L.R. and S.R. filed an opposition on November 16, 1990. The matter was decided, without oral argument, on the written Memorandums submitted by both the Plaintiffs and the Defendants. The Honorable George Arceneaux, District Judge, Presiding, granted the Motion and dismissed the Complaint, without prejudice. Written reasons were assigned. Judgment of Dismissal was entered on December 10, 1990.

Plaintiff timely notice an appeal to the United States Court of Appeal, 5th Circuit. On May 31, 1991, the Fifth Circuit affirmed the Judgment in a per curiam opinion, 934 F.2d 1262 (5th Cir. 1991).

This Honorable Court granted Certiorari on January 10, 1992, limited to the following questions:

> 1) Is there a domestic relations exception to federal Jurisdiction ?



> 2) If so, does it permit a district court to abstain from exercising diversity jurisdiction over a tort action for damages?
>
> 3) Did the District in this case err in abstaining from exercising jurisdiction under the doctrine of Younger v. Harris, 401 U.S. 37 (1971)?

## SUMMARY OF ARGUMENT

The District Court and the Court of Appeals were correct in applying the Domestic Relations Exception to Federal Jurisdiction and dismissing this matter for the following reason:

1) That the Domestic Relations Exception to Federal Jurisdiction include torts between Parent and Child.

Alternatively, the District Court did not abuse its discretion in abstaining based upon the prinicples of Comity and Federalism which underlie the Doctrine of Younger v. Harris, 401 U.S. 37, 91 S.Ct 746 (1971).

## ARGUMENT

IS THERE A DOMESTIC RELATIONS EXCEPTION TO FEDERAL JURISDICTION?

YES. It is powerful enough to defeat the sweeping language of the United States Constitution found in Article III, Section 2, thereof, in granting this Honorable Court original jurisdiction in all cases



affecting ambassadors, other public ministers, and consuls. Justice Holmes in Popovici, Vice Consul of Roumania v. Agler et als, 280 U.S. 379, 50 S.Ct. 154 (1930) left no doubt that this Court recognized and applied the Domestic Relations Exception to Federal Jurisdiction:

> "The words quoted from the Constitution do not of themselves and without more exclude the jurisdiction of the State. Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 18 S.Ct. 685, 42 L.Ed. 1126. The statutes do not purport to exclude the State Courts from jurisdiction except where they grant it to Courts of the United States. Therefore they do not affect the present case it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce. If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the

> Statutes. Suits against 'consuls and vice-consuls' must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts.
>
> . . . .
>
> In the absence of any prohibition in the Constitution or laws of the United States it is for the State to decide how far it will go." (emphasis added).

This Domestic Relations Exception to Federal Jurisdiction has been firmly established since first recognized in

Barber v. Barber, 62 U.S. 582, 16 L.Ed. 226, (1858), to-wit:

> "Our first remark is -- and we wish it to be remembered-- that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction.
> ....
>
> We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to



> divorce a vinculo, or to one from bed and board."

In 1890 the Exception was powerful enough to both defeat and respect the Great Writ of Habeas Corpus as treated by this Court in Ex Parte Burrus, 136 U.S. 586, 10 S.Ct. 850 (1890). In that matter an Ohio Father made application to the United District Court in Nebraska for a Writ of Habeas Corpus to recover the care and custody of his minor child who was in the physical custody of her Grandparents, Thomas F. and Catherine Burrus, a citizen of Nebraska. The Writ was issued.

After hearing the response to the Writ the District Judge found that the minor child was improperly detained by the Grandparents and entered and order awarding the care and custody of the child to the Ohio Father. Subsequently, the child was placed in custody of the Ohio Father and

while in such custody the Grandparents managed to retake physical custody of the child, with violence, and return to the State of Nebraska.

The Nebraska District Court attached the Grandparents and brought them before the Court to answer for contempt in disobeying the order. Found in contempt the Grandfather was imprisoned, in the custody of the U.S. Marshall for three months, in the county jail. The Grandfather filed an application for the Great Writ in the original jurisdiction of the U.S. Supreme Court. This Honorable Court defined the question to be whether the District Court in Nebraska, or the Judge thereof, has any jurisdiction for the Father's Writ of Habeas Corpus and this was the sole question to be decided.

After reciting that the "whole subject of domestic relations of husband and wife,



parent and child, belongs to the laws of the States, and not to the laws of the United States" the Court declared that:

> "we have already said that the relations of the father and child are not matters governed by the laws of the United States, and that the writ of habeas corpus is not to be used by the judges or justices or courts of the United States, except in cases where it is appropriate to their jurisdiction. .... Whatever, therefore, may be held to be the powers of the circuit court in cases of this kind, where necessary citizenship exists between the contestants, which gives the court jurisdiction of all matters between such parties, both in law and equity, where the matter exceeds $2,000 in value, we know of no statue, nor provisions of law, no authority intended to be conferred upon the district court of the United States to take cognizance of a case of this kind, either on the ground of citizenship, or on any other ground found in this case."

Consequently, this Court declared the whole proceeding before the district judge in the district court was void and the

attempt to enforce the judgement by attachment and imprisonment of Burrus (the Grandfather) for contempt is equally void. The Grandfather's application for the Writ of Habeas Corpus was granted by ordering his release from imprisonment.

In Simms v. Simms, 175 U.S. 162, 20 S.Ct. 58, 44 L.,Ed. 115 this court re-affirmed the Domestic Exception to Federal Jurisdiction citing Ex Parte Burrus, supra, by repeating its premise and declaring that, "It may therefore be assumed as indubitable that the circuit courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, or by an original proceeding in equity, before a decree for such alimony in a state court. Within the states of the Union, the whole subject of the domestic relations of husband and wife, parent and



child, belongs to the laws of the States and not the laws of the United States".

This court has never treated the question, even where it allows the enforcement of a state or territorial judgment, without reminding that Domestic Relations Exception to Federal Jurisdiction is present. In every case concerning issues between Husband and Wife, Parent and Child, the Court re-iterates the Exception, whether applicable in a particular case or not. [See De La Rama v. De La Rama, 201 U.S. 303, 26 S.Ct. 485 (1906)].

In Popovici v. Agler, supra., Justice Holmes declared that the whole subject of domestic relations belongs to the laws of the States and if when the Constitution of was adopted the common understanding was that the domestic relations of Husband and Wife and Parent and Child were matters

reserved to the State, there is no difficulty in construing the instrument accordingly and not much in dealing with the Statutes. The remark, "reserved to the State", obviously referred to the 10th Amendment of the U.S. Constitution.

Since the common law relation between husband and wife did not allow tort suits between them[1], such cause of action arose after the concept of diversity as expressed in Article III, Section 2 of the U.S. Constitution and subsequent statutes, including 28 U.S.C. Sec. 1332, and then only by express permission of the States. Since such causes did not exist at the time

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[1] See Thompson v. Thompson, 218 U.S. 611, 31 S.Ct. 111, 54 L.Ed. 1180 (1910). The U.S. Supreme Court, itself, recognized the common law, as it existed in 1910 and in spite of a legislative act giving women to the right to sue for torts, still barred such tort action (assault and battery), based on that common law, against the Husband.



of adoption of the Constitution, the States did not delegate the power to control such suits by a congressional creation of "Diversity of Citizenship". Of course, neither did the 10th Amendment wrest from the States control of such suits, under the guise of "Diversity of Citizenship".

As to Child and Parent, under the common law concerning a tortious parent, that view was clearly expressed by the Mississippi Supreme Court in Hewlette v. George, 68 Miss. 703, 9 So. 885 (1891), to-wit:

> The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interest of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the

child can be heard to demand. Hewlette v. George, 68 Miss. 703 at 711, 9 So. 885 at 887.

A Domestic Exception to Federal Jurisdiction Exists and it covers the whole subject of Domestic Relations from the contract of marriage to dissolution and the consequences thereof, including acts occuring while the marriage and parent and child relationship was in existence, as the States define such subject, including but not limited to torts between Husband and Wife and Parent and Child.

The Domestic Relations Exception to Federal Jurisdiction, as laid out by Barber v. Barber, 62 U.S. 582 (1858), Ex Parte Burrus, 136 U.S. 586, 10 S.Ct. 850 (1890) and Popovici v. Agler, et al, 280 U.S. 379, 50 S.Ct. 154 has survived over 130 Sessions of Congress, since 1859 and by this Court since the Barber decision in the December Term of 1858.



DOES THE DOMESTIC RELATIONS EXCEPTION TO FEDERAL DIVERSITY JURISDICTION PERMIT A DISTRICT COURT TO ABSTAIN FROM EXERCISING JURISDICTION OVER A TORT ACTION FOR DAMAGES?

If the Domestic Relations Exception to Federal Jurisdiction exists, and we say it does, it not only permits the District Court to Abstain form exercising Diversity Jurisdiction but requires it to dismiss the complaint, without prejudice, to enter State Court.

As this Court recognized in Thompson v. Thompson, 218 U.S. 611, 31 s.Ct. 111, 54 L.Ed. 1180 (1910) the common law did not allow suits between Husband and Wife. The Mississippi Supreme Court, in Hewlette v. George, 68 Miss. 703, 9 So. 885 (1891) correctly set out the common law view as it relates to suits between the child and a Parent; there was no such creature.

The states have, among themselves, to whatever extent changed the Common Law. No

uniform standard has been accepted by all of the States. For example Louisiana has prohibited unemancipated children from suing their parents during the existence of the Parents' marriage.[2] Further, Louisiana prohibits tort suits between Husband and Wife, during the existence of the marriage[3].

It is true Louisiana allows suit, in tort, between the spouses after the marriage is dissolved. LSA-Civ. Code Art. 3469. It is also true in Louisiana that children can sue the non-custodial parent after the marriage is dissolved. A tort

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[2] LSA-R.S. 9:571: The child who is not emancipated cannot sue:
(1) Either parent during the continuance of their marriage, when the parents are not judicially separated; or
(2) The parent who is entitled to his custody and control, when the marriage of the parents is dissolved, or the parents are judicially separated.

[3] LSA-R.S. 9:291.



occurring between the spouses or parent and child is a "Domestic Tort" and such tort has to be placed in limbo, waiting for either the child to cease being a child by becoming an adult or the until the marriage is dissolved so that custodial spouse can sue on behalf of the minor. This is state control of torts, solely because of the "Domestic Relationship".

In Alabama its Supreme Court found it necessary to judicially create an exception to parental immunity and allow children to sue their parents for the tort of sexual abuse. However, solely and only, because of the Domestic Relation between Parent and Child treated this tortious act differently than the same tort occurring between legal strangers: the Alabama Court, in its own language, "we do deem it appropriate, however, to require that the proof of alleged sexually abusive conduct be tested

under a 'clear and convincing' standard, as opposed to a mere 'substantial evidence' standard." Hurst v. Capitell, 539 So2d 264 (Sup. Ct. Alabama, 1989).

Each State that approaches the common law doctrine of Spousal and Parental Immunity approaches it with caution. Realizing such doctrine has a special status and involves deep Domestic Relations of it citizens, while such State or States makes exceptions it belongs to the States' interest in its Domestic Relations between the family. The Domestic Relations Exception to Federal Jurisdiction should and ought to be allowed to go where the States take it; the concept of diversity of citizenship, notwithstanding.

The District Court and the Fifth Circuit Court of Appeal acted properly when they applied the Domestic Exception to Federal Jurisdiction, in this matter, and



dismissed the complaint, without prejudice.

ALTERNATIVELY:

THE DISTRICT COURT DID NOT ERR IN ABSTAINING UNDER THE DOCTRINE OF YOUNGER V. HARRIS, 401 U.S. 37 (1971).

The complex interrelationship between the Union and the separate states is framed by the concepts of Comity and Federalism. Termed "Our Federalism" in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669, it forms the "underlying reason" behind abstention in cases which fall under the "Younger doctrine". Id. 401 U.S. at 37, 91 S.Ct. at 746. As articulated by Justice Black:

> ... an even more vital consideration, the notion of "Comity", that is, a proper respect for state functions, a

recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that



this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future. 401 U.S. at 44-45, 91 S.Ct. at 750-51.

In Huffman v. Pursue, Ltd. 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed. 2d 482 (1975) the "civil counterpart" to Younger, informed by the "considerations of comity and federalism which underlie Younger", led to the conclusion that the District Court incorrectly entertained "a pre-appeal interference with a state judicial proceeding" involving a state nuisance statute because such considerations:

> ... permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious 420 U.S. at 610, 95 S.Ct. at 1211.

Judice v. Vail 430 U.S. 336, 97 S.Ct. 1211, 51 L. Ed.2d 376 (1977) and Trainor v. Hernandez 431 U.S. 434 97 S.Ct. 1911, 52 L.Ed.2d 486 extended the "Younger doctrine" to civil proceedings (an extension the Court restricted to its facts in Huffman, Id.) beyond those 'in aid of and closely related to criminal statutes' and further suggested that Comity, as a doctrine unto itself, was "by no means a novel [one]". Judice v. Vail 430 U.S. at 335, 97 S.Ct. at 1217, citing Ex parte Young 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The following passage being explicative:

> These cases rather, are "an application of the reason underlying the Act." Toucey v. New York Life Ins., Co., 314 U.S. 118, 135, 62 S.Ct. 139, 145, 86 L.Ed. 100 (1941), and reflect the applicability, wholly independent of a statutory codification, of the longstanding policies which



> inhere in the notions of comity and federalism, see Younger, 401 U.S., at 43-45, 91 S.Ct., at 750-751; 1 J. Kert, Commentaries on American Law *411-412. 430 U.S. at 335, 97 S.Ct. at 1217 at note 11.

The component parts of "Our Federalism", comity and federalism, have thus been in existence since the creation of our form of government even if the "doctrine of Younger v. Harris" is only twenty years old.

In Younger the plaintiff sought that the federal district court, in its role as an Equity Court, enjoin the District Attorney of Los Angeles County from prosecuting him. It was alleged "that the prosecution and even the presence of the Act [which he was accused of violating] inhibited him in the exercise of his rights of free speech and press, rights guaranteed him by the First and Fourteenth Amendments". 401 U.S. at 39. 91 S.Ct. at 748. The district court was also asked to

declare the Act as being in violation of the Constitution.

Such interference, should it have been granted, would have violated the line of jurisprudence holding that the equity power of the court must be restrained from interfering with criminal prosecutions absent a showing of "extraordinary circumstances, where the danger of irreparable loss is both great and immediate." Fenner v. Boykin, 271 U.S. 240, 244, 46 S.Ct. 492, 493, 70 L.Ed 927 (1926). See also Spielman Motor Sales Co. v. Dodge, 295 u.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322; Beal v. Missouri Pac. R. Co., 312 U.S. 45, 61 S.Ct.418, 85 L.Ed. 577.

The powerful interest of the State in its criminal proceedings was in conflict, however, with the interest of the national government in protecting against the abridgment of First Amendment freedoms. And, where the chilling effect on the First Amendment was sufficiently serious for the



Court to grant injunctive relief in Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), the Younger court distinguished the cases and found, however serious the threat to the First Amendment, "comity, and federalism", or "Our Federalism" demanded that injunctive relief be denied.

A significant concern not addressed in Younger was the command, initially intoned by Chief Justice Marshall in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405, 5 L.Ed 257 (1821), and quoted many times thereafter:

> We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.

Consideration of the "virtually unflagging obligation" to exercise

jurisdiction first appeared in the "Younger context" in Colorado River Water Conservation Dist. v. United States 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). Thereafter, in addition to the concern of the Federal Courts' in enforcing the Constitution and protecting constitutional rights of individuals in its traditional role as a court in equity; the court recognized that a failure to act in that role "treason to the Constitution".

Yet, even as the balance of these extraordinary federal interests were weighed against ever decreasing state interests "the principle of comity"[4], or "the Younger doctrine"[5], still acted to

[4] Fair Assessment in Real Estate Ass'n v. McNary 454 U.S. 100, 119, 102 S.Ct. 177, 187, 70 L.Ed.2d 271 (1981).

[5] Moore v. Sims 442 U.S. 415, 99 S.Ct. 2371, 2377, 60 L.Ed.2d 994, (1979).



stay the hand of federal courts in numerous cases.[6]

In this case, abstention has come to the attention of the Court in a far different setting. There is no collision of constitutional principles; this is a state case involving purely state issues, and implicating purely state concerns. Nor is the court acting in its dynamic, equitable role; instead it is responding to litigation in the passive role to which it is obliged by virtue of diversity

[6] See e.g. Judice v. Vail, 430 U.S. 327, 97 S.Ct. 1211 (1977), [State interest in judicial contempt process]; Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 102 S.Ct. 177 (1981), [In damage action under 42 U.S.C. 1983, state interest in administration of state tax system]; Middlesex County Ethics Comm. v. Garden State Bar Assoc., 457 U.S. 423, 102 S.Ct. 2515, (1982), [State interest in licensure and discipline of lawyers]; Pennzoil Co. v. Texaco, 481 U.S. 1, 107 S.Ct. 1519, 1989 [State interest in administering appeal bond scheme in civil litigation].

jurisdiction. Comparatively viewed, the federal interest is significantly diminished, while the state interest remains the same. Of course, the measure of that interest will increase or wane on a case by case basis; but it is only appropriate that the interest be considered and accepted or rejected as circumstances dictate.

The suggestion that abstention under the "Younger doctrine" must automatically fail for lack of a pending state proceeding, [brief of petitioner, at pg. 14-15] fails to recognize that "Comity" is the "underlying principle" of abstention. It does not disappear simply because there is no pending state court case. If abstention can be summarily denied for this reason, the following anomaly arises: "Comity" is a sufficiently powerful principle that it can require a federal



court to decline to sit in equity and decide constitutional questions; yet, on the other hand, it may not act when that same federal court is sitting in diversity.[7]

The question implicitly raised by asking if the lower court erred in abstaining under the "doctrine of Younger v. Harris" is whether the doctrine, in the first instance, can be extended to cases which are grounded in diversity? The answer should be yes; the doctrine cannot logically be applicable only where the court is sitting in equity in the consideration of federal constitutional questions.

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[7]A diversity action will almost always fail to have a pending state action, nor will there generally be a federal constitutional question as required in Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 102 S.Ct. 2515, (1983).

In Louisiana Power and Light Co. v. Thibidoux, 360 U.S. 25, 79 S.Ct. 1070, (1959) the Court abstained in a matter before it on the basis of diversity and based its power to do so on "a deeper policy derived from our federalism" and not from a "technical rule of equity procedure" 360 U.S. at 28, 79 S.Ct. at 1072.

Brillhart v. Excess Ins. Co. of America 316 U.S. 491, 62 S.Ct. 1173 also lends support. Brillhart came to the court as an action in diversity and was remanded for the district court to exercise its discretion in granting a motion to dismiss (dismissal being an act of abstention). The lack of involvement of federal law and the "gratuitous interference with the orderly and comprehensive disposition of a state court" were the primary factors for the court below to consider. 316 U.S. at



495, 62 S.Ct. at 1175-1176, [8]

Abstention decisions should not be restricted to "rigid pigeonholes" as the various doctrines "reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes". Pennzoil v. Texaco 481 U.S. 1, 11, 107 S. Ct. 1519, 1526, 95 L. Ed.2d 1, note 9, (1987).

In Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L. Ed.2d 483, abstention was appropriate even though it filled none of the established "categories" considering both "[w]ise judicial administration,

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[8]See also Will v. Calvert Fire Ins. Co. 437 U.S. 655, 664 98 S.Ct. 2552, 57 L.Ed. 504, 2558 (1978) wherein both the plurality opinion and the concurring opinion reference the above language and speak to the importance attached to the handling of state issues as opposed to federal ones in that diversity action.

giving regard to conservation of judicial resources and comprehensive disposition of litigation. 424 U.S. at 817, 96 S.Ct. at 1246.[9] In considering abstention, no "mechanical checklist" can be applied. Moses H. Cohen Memorial Hospital v. Mercury Construction Corporation 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765, (1983).

It was proper for the district court to have considered abstention. That inquiry must, of necessity, involve an overview of the interest of both the State and the Federal Government.

Effective January 1, 1992 all of the laws affecting the exercise of juvenile

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[9] It is noted that even though the majority opinion did not join in Chief Justice Rehnquist's view of "Comity" in either Colorado River (supra.) or in Will Calvert, supra. both cases considered factors well beyond the three part test of Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1983).



court jurisdiction in Louisiana became a part of the Children's Code, LSA-Ch.C. Arts. 100-1657 (Acts 1991, No. 235, Approved July 2, 1991). This comprehensive Code is the compilation "of bits and pieces of law affecting children which [were] scattered through eighty-nine separate titles and codes, from "a" adoption found in R.S. 9:4 through "y" (Youth services, Division of) found in R.S. 46:1901". (LSA-Ch.C. "The Drafting of the Children's Code", pg. V).

The Children's Code, of course, is not the only body of law that one must consult to reference the full range of Louisiana's State Interest in the domestic affairs of its citizens - but the 768 page book is a reasonable start. Thereafter, one might refer to the family laws that do not directly involve the imposition of juvenile court jurisdiction such as the laws

relating to marriage, divorce, community property, child custody, inheritance (forced heirship included in this state), filiation, ownership of property, emancipation of minors, and on and on seemingly ad infinitum. While other states may not have such a Byzantine system of recordation, all of these legal concepts must be covered in each state one way or another.

As explained in New Orleans Public Service Inc. v. Council of New Orleans 109 S.Ct. 2506 (1989), in considering the state's interest "we look to is the importance of the generic proceedings to the state." Thus in Younger, California's interest was in enforcing its criminal laws and not in prohibiting an individual from distributing handbills. Id., at 2516. Similarly, the interest of the state herein must be seen as its interest in the



domestic relations of its citizenry, and not in the adjudication of a singular lawsuit. With the possible exception of law enforcement, what greater interest does a state have?

The length and breadth of the state interest in the case before the bar can be measured by the number of courts of record and state agencies involved to date. The record courts include the Civil District Court for the Parish of Orleans, State of Louisiana for separation, divorce, and child custody; Criminal District Court for the Parish of Orleans, State of Louisiana for the arrest and bonding of Jon Richards; Juvenile Court for the 24th Judicial District, Parish of Jefferson, State of Louisiana for child in need of care and termination of parental rights proceedings; Court of Appeal for the 4th Circuit, State of Louisiana for appellate action taken in

the proceedings in Orleans Parish; Court of Appeal for the 5th Circuit, State of Louisiana for appellate action taken in the proceedings which took place in Jefferson Parish; and the Louisiana Supreme Court for review of rulings by the courts below. The state agencies with direct involvement were the District Attorney's Office for the Parish of Orleans, District Attorney's office for the Parish of Jefferson; New Orleans Police Department; Jefferson Parish Sheriff's Office; and Office of Community Services, child sexual abuse unit - all of whom performed some form of individual investigation for themselves or for another agency as mandated by statute. (Joint Response of Jon A. Richards and Debra Kesler in opposition to the Petition for Writ of Certiorari, pgs. 12-14).

That this is a state issue, one best handled and addressed by the States has been accepted by both the Federal Judiciary



and Congress. From Barber v. Barber, supra. to Thompson v. Thompson, 108 S.Ct. 513 (1988) the federal courts have consistently stated that federal involvement in domestic relations matters would "increase the workload of the federal courts and entangle the federal judiciary in domestic relations disputes with which they have little experience and which traditionally have been the province of the States." 108 S.Ct. at 519.

To date, Congress' acceptance of the State role also appears to be complete. As suggested infra. Congress has had over a century to take action on the Domestic Relations Exception and has declined to do so. And though petitioner cites three federal acts for the purpose of highlighting "a growing presence in the policy making and funding of strategies to combat the child abuse problem" (Brief of

Petitioner, at pg. 15), it is Congress' express intent not to "federalize" the issue. Consider the following legislative history to the acts cited by petitioner:

> ... (2) While there are a limited but rising number of child abuse cases tried in the Federal courts, many states have adopted innovative procedures that have far outpaced Federal law, leaving those children who do enter the Federal system (through military bases, Indian reservations, and from other Federal lands and facilities) inadequately protected. The legislation contained in Title XX is not designed, however, to garner any further Federal jurisdiction over child abuse cases. (emphasis added).
>
> (3) At the same time that many states have moved forward in protecting child victims and witnesses, there is also a great deal of inconsistency and disparity among state laws ... and while this legislation does not contemplate in any way further federalizing child abuse, there is a need for Federal legislation that can serve as a model to states ...(Legislative history of the Crime Control Act of 1990, P.L. 101 - 647, House Report No. 101-681(1), pg. 166). (emphasis added).



The area of domestic relations and child abuse is unique and requires special understanding. That petitioner can sweep this hard earned expertise aside with a simple statement[10] is extraordinary. The Senate Report to the Children's Justice Act recognized that reform was required in so many areas unfamiliar to the federal agencies that the State task forces were far "better equipped to assess ... and recommend needed reforms than a Federal agency or Congressional body". (Legislative History Children's Justice and Assistance Act of 1986, P.L. 99-401, amending the Child Abuse Prevention and Treatment Act, Senate Report No. 99-123, at pg. 7).

The role the national government seeks to play in the area of child sexual abuse

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[10] "The lower federal courts have likewise proved themselves competent to analyze and judge child abuse problems" (Brief of petitioner, at pg. 15, citations omitted).

is to facilitate in "coordinating child abuse prevention efforts among the states"[11]. Of particular concern is the coordination of court proceedings because of the desire to minimize secondary trauma to the child ("secondary revictimization"), the existence of multiple judicial proceedings inherent in the problem, and particularized problems in such areas of evidence, difficulties in prosecution, and competency. (Legislative History Children's Justice Act, supra., pages 7-19; see also Legislative History to Child Abuse Prevention and Treatment Act, supra. at page 7).

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[11]Legislative History Child Abuse Prevention Challenge Grants Reauthorization Act of 1989, P.L. 101-126, transferring the program to the "Child Abuse Prevention and Treatment Act", House Report No. 101-113, pgs. 2-3.



This policy of coordination is defeated where a Federal District Court manages litigation, which it is admittedly ill equipped to handle in the first instance, that involves the same issues and the same facts previously handled by the State's Judicial System. Intrusion is both self-defeating and violative of the principles of comity.

The risk run by parallel proceedings is simply too great. Conflicting judgments will occur because 1) the Federal Court must give a trial De Novo of the evidence previously treated by the State Courts, and 2) Litigants will use the Federal District Court as a Court of Appeal in these type of

cases[12]. This is a risk that the District Judge recognized. He did not abuse his discretion[13] in abstaining under Comity and the Doctrine of Younger v. Harris, supra. The rulings of the courts below were correct.

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[12]Appellants' brief, at page 19, says as much when it is suggested that a domestic litigant who feels aggrieved by the State Court Processes should be allowed to have a Federal Forum. Placing the Federal District Court in the position of Reviewing the State Proceedings is, in itself, sufficient grounds to refuse Jurisdiction [See Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303 (1983)].

It is also noted that almost every contested divorce includes a tort of some sort and leaves an unsatisfied litigant who has the potential of seeking a Federal Forum by the device of a State Border and changing the name of the litigation.

[13]Brillhart v. Excess Ins. Co. of America, 316 U.S. at 497, 62 S.Ct. at 1176.



## CONCLUSION

FOR THE REASONS AND PREMISES SETOUT ABOVE THIS HONORABLE COURT SHOULD AND OUGHT TO AFFIRM THE JUDGMENTS OF THE COURTS BELOW.

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